



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

April 7, 2015

Ms. Shirley A. Atkins
5017 E. Tunnel Rd.
Marengo, Indiana 47140

Re: Formal Complaint 15-FC-73; Alleged Violation of the Access to Public Records Act by the Dubois County Health Department

Dear Ms. Atkins,

This advisory opinion is in response to your formal complaint alleging the Dubois County Health Department ("Department") has violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Department has issued a response via Ms. Donna Oeding, Administrative Director. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on February 25, 2015.

BACKGROUND

Your complaint dated February 18, 2015 alleges the Dubois County Health Department violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On January 27, 2015, you submitted to the Department a public records request seeking the copies of birth certificates. In your complaint you assert the Department refused your request in violation of APRA.

On March 10, 2015, the Department responded via Ms. Donna Oeding, Administrative Director. Ms. Oeding acknowledges the complainant has been conducting searches for her birth certificate, but contends that when the first request was made, the incorrect information was given. Ms. Oeding contends no birth certificate was found initially, but one was found in Crawford County. However, Ms. Oeding contends the birth certificate(s) searched for may be subject to the limitations established by Ind. Code § 5-14-3-4(d).

ANALYSIS

The public policy of the APRA states that “a (p)roviding person with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” See Ind. Code § 5-14-3-1. The Dubois County Health Department is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Any person has the right to inspect and copy the Department’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

In the Department’s response, it contends the Department has been cooperating with the complainant in the search and that a birth certificate was found in another location. While Ms. Oeding does not state this directly, the purported reason for refusal is the birth certificates are subject to limitations established by Ind. Code § 5-14-3-4(d). That subsection states:

Notwithstanding any other law, a public record that is classified as confidential, other than a record concerning an adoption or patient medical records, shall be made available for inspection and copying seventy-five (75) years after the creation of that record.

Birth certificates are not inherently confidential and must be made available for public inspection. See Ind. Code § 16-37-2-9(b). Neither party identifies the reason why the record was withheld other than the record may simply not exist in the form in which it was searched.

Consider “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*.

Because I do not have all the information to make the determination, I decline to make a determination as to whether a violation has occurred.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Ms. Donna Oeding